file

Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Northgate Motors, Inc.,

Complainant

v.

Case No. : 97-H-1049

Pontiac Division, General Motors Corporation,

Respondent.

And

Gateway Chevrolet-Oldsmobile-Cadillac, Inc.,

Complainant

v.

Case No.: 97-H-1050

Chevrolet Motor Division, General Motors Corporation,

Respondent.

FINAL RULING ON MOTION FOR SUMMARY JUDGMENT

On June 26, 1997, Northgate Motors, Inc. (Northgate or Complainant) and Gateway Chevrolet-Oldsmobile-Cadillac, Inc. (Gateway or Complainant) filed complaints pursuant to sec. 218.01(3x), Stats., with the Division of Hearings and Appeals (DHA). Northgate and Gateway also filed demands for mediation pursuant to sec. 218.01(7m), Stats. On July 3, 1997, the DHA issued an Order Suspending Proceedings pending mediation.

By letter dated July 10, 1998, the Complainants advised the DHA that mediation had been unsuccessful and requested that these matters be set for hearing. The Order Suspending Proceedings was vacated and a prehearing conference was conducted on July 24, 1998. On September 17, 1998, the Complainants filed amended complaints. Northgate added as a second cause of action the refusal of General Motors Corporation (GM or Respondent) to permit it to

add its Honda and Nissan franchise to its dealership facilities. Gateway added as a second cause of action, GM's refusal to permit it to add its Toyota franchise to its dealership facilities.

On September 25, 1998, the Respondent filed a Motion for Summary Judgment on these matters. At the same time the Respondent also filed a brief and supporting documents in support of its motion. On January 6, 1999, the Complainants filed a response brief and supporting documents opposing GM's motion. Also on January 6, 1999, the Wisconsin Automobile and Truck Dealers Association (WATDA) filed an *amicus* brief opposing GM's Motion. On February 2, 1999, the Respondent filed its reply brief and supporting documents. On February 3, 1999, the Complainants filed a letter in the nature of sur-rebuttal and on February 8, 1999, the Respondent filed a response to the February 8th letter.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Northgate Motors, Inc., and Gateway Chevrolet-Oldsmobile-Cadillac, Inc., Complainants, by

Attorney Gary L. Antoniewicz
Attorney Amy L. Clough
Boardman, Suhr, Curry & Field, LLP
One South Pinckney Street, Fourth Floor
P. O. Box 927
Madison, WI 53701-0927

Attorney Jon P. Axelrod
Attorney Bradley C. Fulton
DeWitt, Ross & Stevens
2 East Mifflin Street, Suite 600
Madison, WI 53703-2865

General Motors Corporation, Respondent, by

Attorney William Conley
Attorney Anita M. Sorensen
Foley & Lardner
P. O. Box 1497
Madison, WI 53701-1497

Wisconsin Automobile and Truck Dealers Association, *amicus curiae*, by

Attorney Mary Ann Gerrard
150 East Gilman Street – Suite A
Madison, WI 53703

The Administrative Law Judge (ALJ) issued a proposed ruling granting the motion on February 18, 1999. The Complainants and WATDA filed objections to the proposed ruling on March 5, 1999. The Respondent filed comments in support of the proposed ruling on March 5, 1999.

Response to Objections

The Complainants argue that the review of the proposed decision should be *de novo*, citing Barillari v. Milwaukee, 194 Wis. 2d 247, 533 N.W.2d 759 (1995). The holding in this case applies to an appellate court's review of a lower court decision. The Complainants cite no statutory or case law authority setting forth a standard for reviewing a proposed ruling granting summary judgment in an administrative proceeding. Sec. 227.46(2m), Stats., provides that "If the decision of the administrator of the division of hearings and appeals varies in any respect from the decision of the hearing examiner, the decision of the administrator of the division of hearings and appeals shall include an explanation of the basis for each variance." The requirement that the agency explain any variance from the proposed decision indicates that the legislature did not intend the review of the proposed decision to be *de novo*.

In its response brief to the Motion for Summary Judgement, the Complainants primarily argued that the clauses in the relocation letters were superceded by the new Dealer Sales and Service Agreements or, alternatively, that these clauses were not intended to be enforced forever. These arguments were adequately addressed in the Proposed Ruling and will not be discussed in these comments. To the extent that the Complainants' objections raise new arguments, these arguments were considered and for the following reasons were found not to be persuasive.

The Complainants' pleadings set forth seven objections to the Proposed Ruling. The first objection is that the "Administrative Law Judge erred as a matter of law by creating a new provision in Wis. Stat. Section 218.01(3x)." The Proposed Ruling, states that sec. 218.01(3x), Stats., only applies to situations in which a dealer agreement requires a dealer to obtain prior approval for a proposed action and *the affected grantor has not approved the proposed action.* According to the Complainants, the italicized language is not found anywhere in the statute and is the basis for the ALJ's "complete misinterpretation of the meaning of the statute."

Section 218.01(3x)(b), Stats., sets forth a three-step process for filing complaints under this section. Section (b)1 provides that a dealer may request approval of a proposed action from a manufacturer. Section (b)2 provides that "an affected grantor [a manufacturer] who does not approve of the proposed action shall ... serve upon the dealer a written statement of the reasons for his disapproval (emphasis added)." Section (b)3 provides that a dealer who is served with a written statement under subdivision 2 may file a complaint with the DHA seeking a determination whether there is good cause for permitting the proposed action to be undertaken. Thus, a complaint under sec. 218.01(3x), Stats., would only be filed in situations in which a dealer sought approval for a proposed action and the manufacturer did not approve the proposed action.

The Complainants' second objection is that the "Administrative Law Judge erred as a matter of law by misconstruing the term 'action' used in Wis. Stats., sec. 218.01(3x)(d)." One of WATDA's arguments in its *amicus* brief was that sec. 218.01(3x)(d)1, Stats., only applies to actions proposed by dealers and does not apply to situations such as these cases in which GM is arguing that the parties have agreed in writing to not undertake an action. The ALJ in the proposed decision concluded that this interpretation would make sec. 218.01(3x)(d)1, Stats., superfluous because under WATDA's interpretation it could only apply to a proposed action which the manufacturer had agreed to in writing but had also disapproved of in writing.

The Complainants and WATDA are arguing that the only significance of sec. 218.01(3x)(d)1, Stats., is that the notice and timeliness requirements contained in sec. 218.01(3x), Stats., would not apply to situations in which the parties have already agreed to the proposed action in writing. If a dealer proposes an action pursuant to sec. 218.01(3x)(b)1, Stats., the manufacturer can approve the proposal, disapprove the proposal, or fail to respond to the proposal in a timely manner. Pursuant to sec. 218.01(3x)(b)2, Stats., if the manufacturer fails to respond in a timely manner, it is deemed to have approved the proposed action. If the manufacturer approves or is deemed to have approved the proposed action, there is no basis for a dealer to file a complaint under this section and the provisions of sec. 218.01(3x)(d)1, Stats., would not be applicable.

On the other hand, if the manufacturer disapproves the proposed action, the dealer is entitled to file a complaint and have a hearing before the DHA. For the provisions of sec. 218.01(3x)(d)1, Stats., to be applicable in this situation, the manufacturer, at some point, would have had to have agreed to the proposed action in writing. It is unclear under what circumstances, if a manufacturer has already agreed in writing to a proposed action, a dealer would be seeking a manufacturer's approval for the proposed action. Under this interpretation sec. 218.01(3x)(d)1, Stats., would be superfluous.

In their response brief the Complainants' suggest that, "failure of a dealer or manufacturer to follow the procedures set forth in sec. 218.01(3x)(b) could be grounds for denial, revocation or suspension of a dealer's or manufacturer's license as set forth in secs. 218.01(3)(a)23-24. Thus, [sec. 218.01(3x)(d)1, Stats.] does nothing more than clarify that a dealer and a manufacturer cannot be sanctioned for failure to follow the procedures in sec. 218.01(3x), if they have already reached a written agreement regarding a proposed change." This explanation for the purpose of sec. 218.01(3x)(d)1, Stats., is also not persuasive.

Sections 218.01(3)(a) 23 and 24, Stats., provide that a license issued under sec. 218.01, Stats., may be denied, suspended or revoked for:

. . .

> 23. Being a motor vehicle dealer who, in breach of an agreement, voluntarily changes its ownership or executive management, transfers its dealership assets to another person, adds another franchise at the same location as its existing franchise, or relocates a franchise without first complying with the procedures in sub. (3x).

24. Being a manufacturer, importer or distributor who fails to comply with the procedures in sub. (3x) regarding a dealer's request for approval of a change of ownership or executive management, transfer of its dealership assets to another person, adding another franchise at the same location as its existing franchise, or relocation of a franchise or who fails to comply with an order of the division of hearings and appeals issued under sub. (3x).

Pursuant to sec. 218.01(3)(a)23, Stats., a dealer may be sanctioned if it undertakes certain changes in breach of the agreement between it and the manufacturer. If, according to the scenario suggested by WATDA and the Complainants, a dealer and manufacturer had agreed to the proposed action in writing, the dealer would not be acting in breach of the agreement. Therefore, the dealer would not risk sanctions pursuant to sec. 218.01(3)(a)23, Stats., if it failed to comply with the requirements of sec. 218.01(3x), Stats. Similarly, as explained above, if a manufacturer had already agreed to a proposed action in writing, there is no reason for a dealer to request approval for a proposed action from a manufacturer following the procedures in sec. 218.01(3x), Stats. Therefore, under WATDA's and the Complainants' scenario there is also no possibility that a manufacturer would be exposed to sanctions pursuant to sec. 218.01(3)(a)24, Stats. Therefore, there is no risk of sanctions against either a dealer or a manufacturer who have agreed to a proposed action in writing but failed to comply with the notice requirements in sec. 218.01(3x), Stats.

The Complainants' third objection is that the "Administrative Law Judge erred as a matter of law by concluding that Complainants had 'bargained away' their statutory rights under Wis. Stats. sec. 218.01(3x)." The basis of this argument is a provision of sec. 218.01, Stats., which prohibits an agreement between a dealer and a manufacturer in which the dealer waives a remedy or defense available to it or prevents a dealer from bringing an action otherwise available under the law. This argument was not raised by the Complainants in their earlier brief and was not addressed in the Proposed Ruling; however, this argument is not persuasive.

Section 218.01(3x)(d)1, Stats., specifically allows parties to enter into a written agreement which will make the provisions of sec. 218.01(3x) inapplicable. GM did not coerce the Complainants into giving up a right, rather it awarded Mr. Kopecko a franchise in exchange for his giving up the right to a hearing under sec. 218.01(3x), Stats. One of the purposes of sec. 218.01, Stats., is to protect dealers from the gross disparity of bargaining power between dealers and manufacturers. The dealer in this case used some of the additional bargaining power provided to him by sec. 218.01(3x), Stats., to obtain a franchise that GM originally had denied him.

The Complaints' fourth objection is that the "Administrative Law Judge erred as a matter of law by proposing to dismiss the Complaints for reasons not set forth by Respondent in its original reply to Complainants' (3x) notice." Pursuant to a provision of the Dealer Sales and Service Agreements that Mr. Kopecko entered into with GM, Mr. Kopecko can request permission from GM to undertake certain actions. These actions include relocation of the dealership facilities, which is what he is seeking to do with respect to the Northgate franchise, and add an additional franchise to an existing facility, which he is proposing to do with respect to his Gateway franchise. Northgate and Gateway did make such proposals citing the applicable

provision of their respective Dealer Sales and Service Agreements. GM denied both requests citing among other reasons the agreements executed by Mr. Kopecko. The only thing that GM did not do was specifically reference sec. 218.01(3x)(d)1, Stats.

Assuming that the Complainants' argument is that GM did not reference the statutory provision, this objection does not make sense. As discussed above, the complaint and hearing provisions of sec. 218.01(3x), Stats., do not come into play until after the manufacturer has denied a proposed action. GM is not arguing that the Complainants cannot request consolidating the dealerships, but only that, if GM denies the request, they are not entitled to a hearing before the DHA to review the denial. Accordingly, it would not have been appropriate for GM to cite sec. 218.01(3x)(d)1, Stats., in its disapproval of the proposed action, but rather to raise it as a defense after the complaints were filed. This is precisely what GM did.

The Complainants' fifth objection is that the "Administrative Law Judge erred as a matter of law by concluding that the terms of the letter agreements superseded the Dealer Sales and Service Agreements". This is a mischaracterization of the Proposed Ruling. In their response brief, the Complainants argued that the Dealer Sales and Service Agreements superseded the letter agreements. As discussed in the Proposed Ruling, the Dealer Sales and Service Agreements expressly incorporated the terms of the letter agreements into the Sales and Service Agreements.

The Proposed Ruling found that the provisions of the letter agreements and the Dealer Sales and Service Agreements were not inconsistent. The dealer still had the right under the Sales and Service Agreements to request approval from GM to consolidate the dealerships. This the Complainants did and GM denied the requests. The Proposed Ruling did find that the Complainants had waived their right to request a hearing before the DHA to review GM's denial. This is not a provision of the Dealer Sales and Service Agreement but it is a statutory right.

The Complaints' sixth objection is that the "Administrative Law Judge erred as a matter of law by ignoring and misapplying the standards for summary judgment and by considering inadmissible parol evidence." The Complainants argue that a factual dispute exists with respect to the meaning of the relevant provisions of the relocation letters and that the ALJ impermissibly used parol evidence to interpret these provisions.

Admittedly, summary judgment may only be granted if no disputed facts exists. However, to deny a motion for summary judgment the factual dispute must be genuine. "Summary judgment may be granted only if 'there is no genuine issue as to any material fact' and that the moving party is entitled to a judgment as a matter of law. Section 802.08(2), Stats. Thus, the 'mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). A factual issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' Id. at 248." Baxter v. DNR, 165 Wis.2d 298, at 312, 477 N.W.2d 648 (Ct.App. 1991).

In their brief responding to the Motion for Summary Judgment the Complainants did not argue that the provisions in the relocation letters were ambiguous. Rather, their argument was that the agreements were superseded by the subsequent Dealer Sales and Service Agreements and that the parties never intended the letter agreements to last forever. In the proposed ruling, these arguments were dismissed because the subsequent Dealer Sales and Service Agreements expressly incorporated the letter agreements into them and the Dealer Sales and Service Agreements have specific termination dates. It was found that the provisions of the letter agreement would expire with the Dealer Sales and Service Agreements.

The Complainants are now arguing that the provisions in the letter agreements are ambiguous and it is inappropriate to consider parol evidence to interpret the provisions. The parol evidence the Complainants are objecting to is found in a portion of the Proposed Ruling describing the background of the dispute and is not used to interpret the relocation letters. This evidence was not used to interpret the relocation letters because there had been no allegation at that point that the letters were ambiguous.

The only question with respect to the interpretation of the relocation letters is the meaning of the phrase "channel strategy." The language in these letters clearly demonstrates that both parties understood that the references in the letter agreements to GM's "channel strategy" referred to having two distinct GM dealerships with separate facilities in Rhinelander. Additional support for the conclusion that the parties understood that Mr. Kopecko had agreed to operate two distinct dealerships from separate facilities is found in his deposition. (Kopecko deposition, pages 113-119) The provisions in the letter agreements do not appear to be ambiguous and it is unnecessary to look at other documents to interpret these letters. However, it is useful to refer to this material to show that Mr. Kopecko clearly understood what he was agreeing to. At the time the Proposed Ruling was issued, there was no genuine dispute with respect to the meaning of the relevant provisions of the relocation letters and the Complainants will not be permitted to create such an issue now.

The Complainants' seventh objection is that the "Administrative Law Judge made [three] factual errors in the proposed ruling which precludes Summary Judgment." The first factual error alleged is the finding that Mr. Kopecko offered to operate two separate dealerships as a *quid pro quo* for being awarded the Gateway dealership. The letter agreements specifically provide that Mr. Kopecko agreed to operate the dealerships pursuant to GM's channel strategy. The other correspondence cited makes it clear that this means two distinct dealerships, operated from separate facilities.

The second alleged error of fact is a misinterpretation of the applicable provision of the letter agreement. The provision provides that Mr. Kopecko will operate the two dealerships "in line with the channel strategy proposed for Rhinelander, Wisconsin, the facility you propose to build will be used exclusively for the Chevrolet-Oldsmobile-Cadillac franchise, void of any non GM franchises." The Complainants argue that the phrase "void of any non GM franchises" refers to the term "exclusively" in this sentence. In other words that the provision should be interpreted that the new facility was not intend to be used exclusively for the Chevrolet-Oldsmobile-Cadillac franchise but rather exclusively for General Motors franchises. In the

context of the entire negotiations between the parties and the letter agreement, this interpretation is strained. Again, it is clear what Mr. Kopecko agreed to do.

The Complainant's objection goes on to state that even with this agreement the Sales and Service Agreement still permits Gateway to propose changes in the use of the facility. As discussed above, no one is arguing that the Complainants cannot propose such a change. The only issue is if GM disapproves of the proposal, whether the Complainants have a right to a hearing under sec. 218.01(3x), Stats.

The third alleged error of fact is a statement that Mr. Kopecko would be unjustly enriched if after agreeing to align and locate his dealerships in a specific manner in exchange for being awarded the Gateway dealership, he was allowed to use the provisions of sec. 218.01(3x), Stats., to consolidate the dealerships. The statement was made in response to a WATDA argument that granting the Motion for Summary Judgment would undermine the benefits given to dealers by the legislature in enacting sec. 218.01(3x), Stats. The ALJ commented that allowing Mr. Kopecko to invoke this right to a hearing after he agreed to align his franchises in a particular manner and establish separate facilities for the dealerships in exchange for being awarded the Gateway dealership would be unfair to GM. The ALJ indicated that finding the Complainants still had a right to a hearing pursuant to sec. 218.01(3x), Stats., after GM had awarded Mr. Kopecko the Gateway franchise in consideration for expressly aligning the dealerships in a manner contrary to the proposed consolidation, would deprive GM of what it had bargained for and; therefore, unjustly enrich Mr. Kopecko. This policy finding may be unnecessary; however, the conclusion is valid.

WATDA has also filed objections to the Proposed Ruling. Their objections essentially restate the arguments raised in their brief opposing the motion and are addressed in the proposed ruling. With the exception of the correction of two typographical errors, the proposed decision is adopted as a final decision in this matter.

Ruling

The procedure for summary judgment for civil actions in circuit court is governed by sec. 802.08, Stats. For purposes of this ruling the procedure applicable for civil actions will be followed. The purpose of summary judgment is to obviate the need for a trial where there is no genuine issue to any material fact. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d. 349, 286 N.W.2d 831 (1980). Summary judgment is not available if any disputed facts exist or if reasonable inferences leading to conflicting results may be drawn on the basis of uncontested facts. Tomlin v. State Farm Mut. Auto Liability Ins. Co., 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

The methodology for summary judgment is that the court first examines the pleadings to determine whether claims have been stated and a material fact issue is presented. If the complaint states a claim and the pleading show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party has made a *prima facie* case, the court examines the affidavits submitted by the

opposing party for evidentiary facts and other proof to determine whether genuine issues exist as to any material fact, or reasonable conflicting inferences may be drawn from undisputed facts, and therefore trial is necessary. In re Cherokee Park Plat, 113 Wis. 2d 112, 334 N.W.2d 580 (App. 1983).

The following facts are essentially undisputed.

William Kopecko and William Browne jointly owned Gateway Chevrolet-Buick (Gateway I). As indicated Gateway I represented Chevrolet and Buick. The dealership facilities for Gateway I were located at 1911 Stevens Street in Rhinelander (Gateway I facilities). Although Mr. Kopecko and Mr. Browne jointly owned the dealership, Mr. Browne was the sole authorized Dealer-Operator for Gateway I. On March 8, 1995, Mr. Kopecko executed a Stock Purchase Agreement to purchase Mr. Browne's 50% ownership of Gateway I. Mr. Browne requested approval from GM to transfer his ownership of the franchise to Mr. Kopecko.

In the early 1990's GM developed and began implementing its "Year 2000 Plan." According to GM the purpose of the plan is "to have the right number of dealers in the right location in a manner properly configured to best promote GM's products." (Bishop Aff. ¶ 2, Ex. A , filed in support of Resp. initial brief) In 1995, GM "refined" its Year 2000 Plan and on October 5, 1995 announced its "Network" or "Channel Strategy." Under GM's Year 2000 Plan, Rhinelander is identified as a "Hub Town." Pursuant to GM's Channel Strategy its goal is to have two separate and distinct GM dealerships in Hub Towns aligned as follows: one dealership selling Chevrolet, Oldsmobile and Cadillac and a second dealership selling Pontiac, Buick and GMC.

At the time of Mr. Browne's request for approval to transfer his ownership of the Gateway I franchise to Mr. Kopecko, Mr. Kopecko was the authorized Dealer-Operator of Northgate. Northgate represented Pontiac, GMC, Oldsmobile and Cadillac. (Mr. Kopecko was also the authorized Dealer-Operator of Northway Honda-Nissan, Inc., and Northway Toyota, Inc.) GM initially denied Mr. Browne's request based upon Mr. Kopecko's alleged failure to perform to GM's standards at his Northgate dealership.

By letter dated March 29, 1996 addressed to Paula McFarland, Pontiac Zone Manager, and Don Bishop, Chevrolet Zone Manager, Mr. Kopecko offered to GM that in exchange for GM naming him Dealer-Operator of Gateway, he would operate two separate GM dealerships in Rhinelander. (Kopecko Dep. 117-19, Ex. 3) By letter dated April 30, 1996, Mr. Bishop notified Mr. Kopecko that it would reconsider his application to be named Dealer-Operator of Gateway I if Mr. Kopecko provided certain additional information. The April 30th letter also provided:

> General Motors Corporation has advised you of its Year 2000 Plan for realigning Rhinelander, WI. into a Chevrolet-Oldsmobile-Cadillac dealership and a Pontiac-Buick-GMC dealership. Since you are currently dealer-operator at the Pontiac-Oldsmobile-Cadillac-GMC dealership and 50% financial participant in the

Chevrolet-Buick dealership, we are willing to reconsider our position based upon the effectiveness of your Business Plan and your building proposals.

(Bishop Aff. ¶ 8, Ex. F)

After further negotiations and an exchange of information on June 26, 1996, Don Bishop recommended approval of the revised proposal submitted by Mr. Kopecko. Mr. Bishops's recommendation included the following comment:

THIS PROPOSAL IS BEING WRITTEN TO ADDRESS THE FOLLOWING PROPOSED CHANGES FOR THE RHINELANDER, WI. LOCATION: CHANGE IN DEALER-OPERATOR, REALIGNMENT OF GM DEALERSHIPS IN RHINELANDER TO CONFORM TO CHANNEL STRATEGY, SITE APPROVAL FOR BUILDING OF NEW DEALERSHIP FOR CHEVROLET-OLDSMOBILE-CADILLAC DEALERSHIP.

CHANNEL STRATEGY

THE CHANNEL STRATEGY FOR RHINELANDER, WI. IS FOR A TWO-GM TOWN. CURRENT ALIGNMENT IS CHEVROLET-BUICK AND PONTIAC-OLDSMOBILE-CADILLAC-GMC. THE PROPOSED DEALER-OPERATOR FOR THE CHEVROLET-BUICK DEALERSHIP, WILLIAM L. KOPECKO, AND THE CURRENT DEALER-OPERATOR FOR THE PONTIAC-OLDSMOBILE-CADILLAC-GMC TRUCK, WHICH IS ONE AND THE SAME PERSON, HAS AGREED TO BUILD A NEW FACILITY TO HOUSE A CHEVROLET-OLDSMOBILE-CADILLAC DEALERSHIP AND UTILIZE THE EXISTING CHEVROLET-BUICK DEALERSHIP FOR THE PONTIAC-BUICK-GMC DEALERSHIP. THE LAND IS ALSO OWNED BY WILLIAM KOPECKO AND THESE DEALERSHIPS WOULD BE ADJACENT TO ONE ANOTHER. IN ADDITION, THE NON-GM DUAL LINE OF HONDA WILL BE MOVED OFF-SITE TO JOIN MR. KOPECKO'S NISSAN OPERATION WHERE HE IS ALSO 50% OWNER.

(Bishop Aff. ¶ 11, Ex. I)

Bishop's recommendation also expressly stated: that

CHEVROLET IS WILLING TO MAKE AN EXCEPTION TO POLICY REGARDING THE APPOINTMENT OF MR. KOPECKO AS DEALER-OPERATOR, WHOM WE FORMERLY DENIED FOR NONPERFORMANCE, BASED UPON THE CHANNEL STRATEGY REALIGNMENT AND CONSTRUCTION OF NEW BUILDING." (Id.)

On August 12, 1996, Mr. Kopecko agreed in writing to these conditions, acknowledging that he would realign the two GM franchises as follows: Northgate as a Pontiac-Buick-GMC dealership and Gateway as a and a Chevrolet-Oldsmobile-Cadillac dealership. Mr. Kopecko further agreed that the Honda dealership would be removed from the Gateway I premises.

(Kopecko Dep. 134-36, Ex. 10) He also agreed to modernize the Gateway I facility in accordance with the image plan of Pontiac-Buick-GMC.

On September 18, 1996, Mr. Kopecko agreed in writing to take specific actions in exchange for Chevrolet's approval of the fifty percent stock ownership sale of Gateway I to Kopecko. (Kopecko Dep. 139-40, Ex. 11) In accordance with the terms of the approval, Kopecko agreed to temporarily move the Chevrolet-Oldsmobile-Cadillac dealership to the Honda facility, and then remove it by May 1997 to the new facility located at 1935 North Stevens Street and adjacent to the Gateway I facility. (Id.) This new facility is referred to as the Gateway II facility. Kopecko further agreed to move the Pontiac-Buick-GMC franchises in the fall of 1996 to the original Gateway I facility. Pursuant to Paragraph 4 of the Chevrolet Agreement, Kopecko expressly agreed that the new facility to be built would be used exclusively for the Chevrolet-Oldsmobile-Cadillac franchise.

On September 18, 1996, the parties executed Dealer Sales and Service Agreements for the Northgate and Gateway franchises. The terms of the Gateway agreement included item "Thirteenth" "The following agreements and understanding are hereby incorporated into this agreement: --RELOCATION APPROVAL," item "Second" "The Standard Provisions" (Form GMMS-1013) are incorporated as part of this agreement," and item "First" "This agreement shall expire on September 17, 2001 ...." (Comp. Appendix, pp. 68 and 72) The terms of the Northgate agreement included item "Fifteenth" "The following agreements and understandings are hereby incorporated into this Agreement: -- RELOCATION APPROVAL," item "Second" "The Standard Provisions" (Form GMMS-1013) are incorporated as part of this Agreement," and item "First" "This Agreement shall expire on October 31, 2000, ..." (Comp. Appendix, pp. 138 and 141)

Discussion

Sec. 218.01(3x), Stats., provides in relevant part:

> (3x) DEALERSHIP CHANGES. (a) In this subsection, "affected grantor" means a manufacturer on direct dealerships, a distributor on indirect dealerships or an importer on direct dealerships that has entered into an agreement with a motor vehicle dealer and that is directly affected by an action proposed to be undertaken by the dealer under this subsection.
>
> (b) 1. If a motor vehicle dealer's agreement with an affected grantor requires the grantor's prior approval of an action proposed to be undertaken by the dealer under this subsection, a dealer may not voluntarily . . . add another franchise at the same location as its existing franchise or relocate a franchise without giving prior written notice of the proposed action to the affected grantor and to the department of transportation. Within 20 days after receiving the notice, the affected grantor may serve the dealer with a written list of the information not already known or in the possession of the grantor that is reasonably necessary in order for the grantor to determine whether the proposed action should be approved.

2. An affected grantor who does not approve of the proposed action shall, within 30 days after receiving the dealer's written notice of the proposed action or within 30 days after receiving all the information specified in a written list served on the dealer under subd. 1., whichever is later, file with the department of transportation and serve upon the dealer a written statement of the reasons for its disapproval. . . . If an affected grantor files a written statement within the applicable period, the dealer may not voluntarily undertake the proposed action unless it receives an order permitting it to do so from the division of hearings and appeals under par. (c) 2.

3. A dealer who is served with a written statement by an affected grantor under subd. 2. may file with the department of transportation and the division of hearings and appeals and serve upon the affected grantor a complaint for the determination of whether there is good cause for permitting the proposed action to be undertaken. The division of hearings and appeals shall promptly schedule a hearing and decide the matter. The proposed action may not be undertaken pending the determination of the matter.

(c) 1. In determining if there is good cause for permitting a proposed action to be undertaken, the division of hearings and appeals may consider any relevant factor including:

a. The reasons for the proposed action.

b. The affected grantor's reasons for not approving the proposed action.

c. The degree to which the inability to undertake the proposed action will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment.

d. Whether the proposed action is in the public interest.

e. The degree to which the proposed action will interfere with the orderly and profitable distribution of products by the affected grantor.

f. The impact of the proposed action on other motor vehicle dealers.

2. The decision of the division of hearings and appeals shall be in writing and shall contain findings of fact and a determination of whether there is good cause for permitting the proposed action to be undertaken. The decision shall include an order that the dealer be allowed or is not allowed to undertake the proposed action, as the case may be.

(d) This subsection does not apply to:

1. An action that has been agreed to in writing between a dealer and each affected grantor.

The letter agreement dated August 8, 1996, and executed by Mr. Kopecko on August 12, 1996, provides:

> This letter is written by Pontiac of General Motors on behalf of Buick, GMC and itself ("Divisions") in response to your recent request to relocate your dealership operations to dealer facilities located at 1911 N. Stevens Street, in the community of Rhinelander. The Divisions approve your request subject to the following conditions and understandings:
>
> > You agree to realign the current General Motors franchises from Northgate Motors, Inc. (P-O-K-G) and Gateway Chevrolet-Buick, Inc. as follows:
> >
> > Pontiac-Buick-GMC
> > Chevrolet-Oldsmobile-Cadillac
> >
> > Honda will be removed from the General Motors dealership facilities.

The letter agreement dated September 6, 1996, and executed by Mr. Kopecko on September 18, 1996, provides:

> This letter, written on behalf of Chevrolet, Oldsmobile and Cadillac hereby approves the fifty percent (50%) stock ownership of Gateway, Chevrolet-Buick proposed to be changed with the buy-out of Mr. W. R. Browne by Mr. W. L. Kopecko. With the change in dealer-operator, the name of the corporation will be changed to Gateway Chevrolet-Oldsmobile-Cadillac, and the relocation of the new facility subject to the following conditions:
>
> . . .
>
> 4. General Motors expects all dealer facilities to be in preferred locations, to meet GM Image Standards and to be devoted to General Motors. In line with the Channel Strategy proposed for Rhinelander, WI., the facility you propose to build will be used exclusively for the Chevrolet-Oldsmobile-Cadillac franchise, void of any non-GM franchises.

The facts in these matters are essentially undisputed. The only dispute is what effect the above quoted provisions of the letter agreements should be given. Specifically, the issue is whether the letter agreements constitute written agreements pursuant to sec. 218.01(3x)(d)1, Stats., which would make the provisions of sec. 218.01(3x), Stats., inapplicable to the Complainants' relocation requests.

The Complainants argue that the subject provisions of the letter agreements were superceded by the provisions of the Dealer Sales and Service Agreements (SSAs) which were subsequently executed by the parties. This argument has no merit. As cited above the letter

agreements were expressly incorporated into the SSAs; therefore, it was obviously not the intent of the parties that the SSAs supercede the letter agreements.

The Complainants also argue that the agreements set forth in the two letters were not intended to forever prohibit the Complainants from requesting permission to relocate and that upon the execution of the SSAs the Complainants were free to request relocation and exercise their rights under sec. 218.01(3x), Stats. GM does not dispute that the agreements were not intended to last forever. However, as also cited above, the SSAs include termination dates; therefore, the letter agreements do not forever prohibit Mr. Kopecko from requesting permission to relocate the dealerships, but only for the terms of the respective SSAs.

Alternatively, the Complainants argue that the SSAs superceded the letter agreements because the relevant portions of the letter agreements contradict Article 4.42 of the Standard Provisions of the SSAs. The Complainants argue that to the extent these provisions of the letter agreements are inconsistent with those of the SSAs, the SSAs should control because they were executed after the letter agreements.

Article 4.42 of the Standard Provisions provides in part:

> If Dealer wants to make any change in location(s) or Premises, or in the uses previously approved for those Premises, Dealer will give Division written notice of the proposed change, together with the reasons for the proposal, for Division's evaluation and final decision in light of dealer network planning considerations. No change in location or in the use of Premises, including addition of any other vehicle lines, will be made without Division's prior written authorization.
>
> (Comp. Appendix, pp. 114 and 159)

On their face the relevant provisions of the letter agreements do not contradict and are not inconsistent with Article 4.42 of the SSAs. Mr. Kopecko, pursuant to Article 4.42, has the right to request GM's permission to relocate his dealerships or make changes in the use of the premises (such as adding another franchise to the facilities). The Complainants did make such requests and GM denied the requests consistent with the provisions of Article 4.42. Mr. Kopecko then filed the instant complaints pursuant to sec. 218.01(3x), Stats., with the DHA.

Section 218.01(3x), Stats., was enacted by the Wisconsin Legislature to regulate the relationship between dealers and manufactures. Section 218.01(3x), Stats., was intended to expand dealer's rights over and above standard provisions such as Article 4.42. If a manufacturer (affected grantor) denies a dealer's relocation request, sec. 218.01(3x), Stats., entitles a dealer to a hearing before the DHA to review the manufacturer's denial. If after hearing, the DHA determines good cause exists to permit the relocation, the DHA has authority to issue an order allowing the relocation.

The process established by sec. 218.01(3x), Stats., is extracontractual. In a recent decision, the Seventh Circuit Court of Appeals found that sec. 218.01(3x), Stats., does not unconstitutionally impair the right of parties to contract. Chrysler Corporation v. Kolosso Auto

Sales, Inc., 148 F.3d 892 (7th Cir. 1998). The court held that sec. 218.01(3x), Stats., is constitutional despite the fact that it retroactively voids provisions in existing contracts. Critical to the court's analysis was its determination that this particular regulation of the relationship between motor vehicle dealers and manufacturers was foreseeable at the time the contract was made.

In the instant case, the contract was made after the enactment of sec. 218.01(3x), Stats., and the provisions of sec. 218.01(3x), Stats., unquestionably apply to these contracts. This includes the limitations set forth at sec. 218.01(3x)(d), Stats. Although there is no reference to sec. 218.01(3x)(d)1, Stats., in any of the documents generated during the negotiations between GM and Mr. Kopecko, presumably both the representatives of GM and Mr. Kopecko were aware of this provision when the terms of the letter agreements were negotiated. The Respondent presumably negotiated the letter agreements with sec. 218.01(3x), Stats., in mind. Similarly, Mr. Kopecko was aware of the rights he was giving up and was willing to do so in exchange for being awarded the Gateway Dealership.

The right to a hearing before the DHA is contained in sec. 218.01(3x), Stats., not the SSAs. Mr. Kopecko bargained this right away in exchange for GM awarding him the Gateway franchise. Pursuant to the provisions of sec. 218.01(3x)(d)1, Stats., Mr. Kopecko gave up his rights under sec. 218.01(3x), Stats.

As discussed above, the relevant provisions of Article 4.42 and the letter agreements do not appear to be inconsistent. However, if they are inconsistent, pursuant to well established principles of contract interpretation, the specific provisions control the general provisions of contracts. Goldman Trust v. Goldman, 26 Wis.2d 141, at 148, 131 NW2d 902 (1965). Accordingly, to the extent that Article 4.42 of the SSAs conflicts with the language in the letter agreements, if at all, the specific provisions of the letter agreements, which were negotiated by the parties, controls the standard language of the SSAs.

Finally, WATDA has filed an *amicus* brief arguing that granting the Respondent's Summary Judgment Motion would undermine the provisions of sec. 218.01(3x), Stats. The Wisconsin Legislature enacted sec. 218.01(3x), Stats., to regulate this area of the motor vehicle dealer/motor vehicle manufacturer relationship. WATDA's concerns are unfounded. In this instant case the Respondent presumably negotiated the letter agreements with sec. 218.01(3x), Stats., in mind. Analogous to the analysis in Kolosso, Mr. Kopecko was presumably aware of the rights he was giving up and was willing to do so in exchange for being awarded the Gateway dealership. Kopecko would now be unjustly enriched if, after agreeing to align and locate his dealerships in a specific manner in exchange for being awarded the Gateway dealership, he was allowed to use the provisions of sec. 218.01(3x), Stats., to seek relocation of the dealerships.

WATDA argues on page 12 of its brief that sec. 218.01(3x)(d)1, Stats., "obviously refers to the dealer's proposed action and is intended to eliminate the dealer's need to initiate the statutory procedures where the manufacturer and dealer already are in agreement that the proposed action should be undertaken." WATDA argues that the effect of sec. 218.01(3x)(d)1, Stats., is limited to freeing the parties from complying with the notice requirements of sec. 218.01(3x)(b)1, Stats., if the parties have already agreed in writing to a proposed action.

WATDA is apparently arguing that sec. 218.01(3x)(d)1, Stats., applies only to actions proposed by dealers, but not to actions both the dealer and affected grantor have agreed will not be undertaken. If sec. 218.01(3x)(d)1, Stats., is read literally, there is arguably support for this construction. Sec.218.01(3x)(d)1, Stats., is only stated in the affirmative. It provides that sec. 218.01(3x), Stats., does not apply to a proposed action that has been agreed to in writing. It does not state that sec. 218.01(3x), Stats., is inapplicable if the dealer and affected grantor have agreed in writing that a proposed action may *not* be taken. Although a literal reading of sec. 218.01(3x)(d)1, Stats., may support WATDA's interpretation, such an interpretation would render this provision superfluous.

This interpretation would render sec. 218.01(3x)(d)1, Stats., superfluous in that sec. 218.01(3x), Stats., only applies to situations in which a dealer agreement requires a dealer to obtain prior approval for a proposed action and the affected grantor has not approved the proposed action. It is impossible to conceive of a situation where an affected grantor has agreed in writing to an action but has not approved the proposed action. Accordingly, sec. 218.01(3x)(d)1, Stats., would apply to situations that would never occur.[1]

Granting GM's motion will not eviscerate sec. 218.01(3x), Stats., as argued by WATDA. To the contrary, Mr. Kopecko apparently used the rights granted to him by sec. 218.01(3x), Stats., as additional bargaining leverage in negotiating to have GM name him Dealer-Operator of Gateway. Denial of GM's motion would deny GM a benefit for which it contracted.

Conclusions of Law

The Administrators concludes"

1. The proposed actions of the Complainants are the subject of written agreements between the dealer and the affected grantor. Accordingly, pursuant to sec. 218.01(3x)(d)1, Stats., the provisions of sec. 218.01(3x), Stats., are not applicable to the proposed actions which are the subject to the complaints filed in these matters.

2. Pursuant to secs. 218.01(3x)(b)3 and 227.43(1)(bg), Stats., the DHA has the authority to issue the following Order.

[1] WATDA may respond that the purpose of the provision is to cover the situation where an affected grantor agrees to a proposed action in writing and then reneges on its approval. If that is the case, then the provision should also cover the situation where a dealer agrees in writing and then changes his mind.

Order

The Administrator orders:

The Motion for Summary Judgment filed by the Respondent is GRANTED and the complaints filed by Northgate and Gateway are DISMISSED.

Dated at Madison, Wisconsin on April 16, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By: David H Schwarz

DAVID H. SCHWARZ
ADMINISTRATOR

F:\DOCS\GENDECISION\NORTHGATE.FIN.DOC